IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. .....

MID-VALLEY PIPELINE COMPANY, Appellant,

vs.

DONALD R. KING, Commissioner of Revenue, Appellee.

MID-VALLEY PIPELINE COMPANY, Appellant,

vs.

THOMAS D. BENSON, Commissioner of Revenue, Appellee.

Three Cases.

MOTION TO DISMISS APPEAL.

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MOTION TO DISMISS APPEAL.

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves to dismiss the appeal from the final judgment and decree of the Supreme Court of Tennessee upon the ground that it does not present a substantial federal question.

MAY IT PLEASE THE COURT:

OPINIONS BELOW.

The opinion of the Supreme Court of Tennessee in these cases is not as yet officially reported but is unofficially reported at 431 S. W. 2d 277. The opinion of the trial court, the Chancery Court of Davidson County, is not reported officially or otherwise. Both opinions are correctly reproduced in Appendices A and C, respectively, of Appellant's Jurisdictional Statement.

JURISDICTION.

The procedural jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED.

Whether a foreign corporation engaged exclusively in interstate commerce in Tennessee is liable for the Tennessee corporation franchise and excise taxes, which are imposed upon the doing of business in corporate form in Tennessee or as a recompense for the protection of its local activities and the benefit received from the doing of business in Tennessee.

STATUTES INVOLVED.

The pertinent provisions of the Tennessee taxing statutes involved are as follows:

Excise Tax

"67-2701. Corporations subject to tax—Rate.—All corporations, cooperatives conducted for profit, joint-stock associations and business trusts, organized under the laws of this state, other than those organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception, pay to the commissioner of revenue annually an excise tax, in addition to all other taxes, equal to five per cent (5%) of the net earnings for their next preceding fiscal year, from business done within the state; provided, however, net earnings shall not include dividends received from any other corporation paying excise tax under the provisions of this chapter, where such other corporation is a wholly owned subsidiary of the taxpayer; provided further, that all entities enumerated hereinabove and

taxable under this section may carry their current year's losses forward two (2) years in computing net income subject to said tax.

"Every such taxable entity organized and existing under and by virtue of the laws of this or any other state, territory or country, or organized and existing without any specific statutory authority, now or hereafter doing business within this state, without domesticating or qualifying to do business in this state, or while its charter is forfeited, revoked or suspended, shall as a recompense for the protection of its local activities and as compensation for the benefits it receives from doing business in Tennessee, pay the tax imposed by this chapter."

Franchise Tax

"67-2902. Corporation subject to tax.—All corporations organized under the laws of this state, other than those organized for general welfare and not for profit, and all corporations organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception other than as provided in § 67-2911, pay to the commissioner of finance and taxation annually a privilege tax in addition to all other taxes, the rate and measure of which are hereinafter set forth. The tax hereby imposed shall be paid for the **privilege** of engaging in business **in corporate form** in this state and shall be in addition to all other taxes levied by any other statute.

"The tax hereinbefore levied shall also be paid by all business trusts, commonly known as Massachusetts Trusts, for the privilege of doing business in Tennessee and the word 'corporation' when used herein shall be deemed to include a business trust unless the particular context requires a different meaning" (Emphasis supplied).

STATEMENT.

The facts as set forth in Appellant's Statement of the Case (pp. 7-8 of Jurisdictional Statement) are accurately stated. The record further shows, however, substantial local activities carried on by Appellant in Tennessee in the exercise of its corporate franchise.

Appellant owns properties in Tennessee consisting of a right of way traversing the State fifty feet in width, parcels of land upon which are situated two pumping stations and seven microwave towers; and two station wagon vehicles and miscellaneous equipment for right-of-way maintenance and fire-fighting. It has four resident employees engaged in the operation and maintenance of its line and appurtenances. Two of these reside in company-owned houses at Appellant's pumping stations.

Appellant contracts with two local suppliers of electric power to obtain the electricity necessary to operate its pumping stations. This is done by Appellant in its capacity as a corporation. Appellant likewise takes title to property in Tennessee in its corporate capacity, and sues and is sued in the courts of Tennessee as a corporation.

ARGUMENT.

The question presented by this appeal is in no sense a new one. It has been resolved by this Court adversely to Appellant's position in several cases over the past thirty-odd years. Though Appellant has persistently and vigorously emphasized the interstate character of its business activities and their commerce clause immunity to Tennessee taxation, the record shows that the predicate for the questioned taxes is not the character of Appellant's business, but the manner and form in which that business is conducted.

The Supreme Court of Tennessee has consistently held the excise and franchise taxes to be upon "the privilege of doing business **in corporate form,**" **Texas Gas Transmission Corp. v. Atkins**, 197 Tenn. 123, 131, 270 S. W. 2d 384, cert. den. 348 U. S. 883, 99 L. Ed. 694; "upon the particular privilege of doing business in the corporate capacity; i. e., with the advantages that arise from the corporate or quasi corporate organization," **Bank of Commerce & Trust Co. v. Senter**, 149 Tenn. 569, 583, 260 S. W. 144; "upon the privilege of doing business as a corporation and exercising the corporate powers for the purpose of producing a profit," **Memphis Dock & Forwarding Co. v. Fort**, 170 Tenn. 109, 110, 92 S. W. 2d 408; "upon the privilege of exercising the corporate privilege in this state," **Jorgensen-Bennett Mfg. Co. v. Knight**, 156 Tenn. 579, 583, 3 S. W. 2d 668; and upon "the right to do business in corporate form," **Corn v. Fort**, 170 Tenn. 377, 95 S. W. 2d 620.

Since the decision in **Texas Gas Transmission Corp. v. Atkins**, supra, the most recent of these decisions, the General Assembly has further defined the basis of the taxes. In 1955, amendments were added to exact the tax, in the

case of a foreign corporation not qualified in Tennessee, or of a Tennessee corporation doing business under a revoked or suspended charter, as a recompense for protection afforded or benefits received from doing business in Tennessee. Secs. 67-2701, 67-2902, T. C. A. As so laid these taxes have been sustained by the Tennessee Supreme Court in a second case styled **Texas Gas Transmission Corp. v. Atkins**, 205 Tenn. 495, 327 S. W. 2d 305.

I.

The Decision Below Is Clearly Correct.

No extended argument is necessary to demonstrate that the Tennessee Supreme Court decision of this cause is wholly consonant with previous pronouncements of this Court, and in no wise contrary thereto. It was clearly recognized in **Southern National Gas Co. v. Alabama**, 301 U. S. 148, 81 L. Ed. 970, that a tax laid upon the right to exercise corporate functions in a state was not synonymous with one upon the actual doing of business.

In **Interstate National Gas Co. v. Stone**, certiorari denied 308 U. S. 522, 84 L. Ed. 442, the lower court had upheld a Mississippi franchise tax as against a foreign corporation doing only an interstate business. Though this Court wrote no opinion in the case, it did subsequently note in **Memphis Natural Gas Co. v. Stone**, 335 U. S. 80, 92 L. Ed. 1832, that it had considered the tax as one not on business but "on the privilege of exercising corporate functions within the State and its employment of its capital" in Mississippi.

What squarely controls the case at bar, however, is the decision proper in **Memphis Natural Gas Co. v. Stone.** Therein the taxpayer was an unqualified foreign corporation, engaged exclusively in interstate commerce. The sole

business was the operation of an interstate pipeline traversing one hundred thirty-five miles in Mississippi. Its only employees were those necessary to maintain the line and its auxiliary appurtenances.

The taxpayer resisted the payment of Mississippi's franchise tax on commerce clause grounds. The tax was laid

> ". . . upon every corporation . . . organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority now, or hereafter doing business within this state . . .
>
> . . . It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

The Supreme Court of Mississippi construed the tax as "an exaction which the State requires as a recompense for the protection of (local) activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it in the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system . . ." This Court held that it was bound by the construction accorded the Mississippi statute by the highest court of that State, and that as so construed the statute could not be held to be upon the privilege of engaging in interstate commerce.

A. The Instant Case Is Not Factually Distinguishable From Memphis Natural Gas v. Stone.

In the case at bar Appellant mans, maintains and operates an exclusively interstate pipeline and its auxiliary appurtenances, all in the exercise of its corporate functions and the powers and privileges afforded to it by the corporate form of organization. In the carrying out of these functions it receives protection from the State and benefits of a substantial nature.

Appellant stresses the fact that it neither buys nor sells, accepts nor delivers any products in Tennessee. Such was likewise true in **Memphis Natural Gas**, with the exception that there one wholesale customer existed in Mississippi. This fact, however, played no observable part in that decision. The latter was grounded upon the exercise by **Memphis Natural Gas** of corporate functions in Mississippi, not upon any alleged intrastate business carried on there. The nature or volume of any business transactions was obviously quite immaterial.

No other distinction of fact is suggested in the instant record. Appellant rather strives to establish that **Memphis Natural Gas** has been sapped of all precedential value by later decisions, chiefly **Spector Motor Service v. O'Connor**, 340 U. S. 602, 95 L. Ed. 573.

B. Spector Does Not Supersede Memphis Natural Gas.

Appellant in common with other multi-state corporations, interprets **Spector Motor Service v. O'Connor** quite broadly. That decision is seen as immunizing from all state privilege taxation all business concerns carrying on in a state only interstate commerce activities. Any other decision of this Court to the contrary of that interpretation is viewed as swept away. No such categorical effect can be ascribed to the **Spector** case.

What was involved in **Spector** was a Connecticut tax described by that State's highest court as "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state," 340 U. S. 606, 95 L. Ed. 577. Where the operating incidence of the tax is the doing of business, and the business is exclusively interstate, then the judgment is obvious.

The Court then went on carefully to point out:

> "The State is not precluded from imposing taxes upon other activities or aspects of this business which unlike the privilege of doing interstate business, are subject to the sovereign power of the State."
>
> 340 U. S. 609, 95 L. Ed. 578.

The Mississippi tax in **Memphis Natural Gas** had been found to be for the protection of local activities incidental to peculiarly corporate powers and privileges, and upon that basis sustained. A tax upon a corporation for the privilege of doing business is manifestly not synonymous with one upon a corporation for exercising its function **in a corporate form and manner.** This distinction is one of substance and not of mere semantics.

Secondly, **Spector** did not purport to overrule **Memphis Natural Gas,** nor any other decision. Had this Court intended such a result it would doubtless have so stated in terms specific and unmistakable. Rather, it went to pains to point out that its conclusion was not in conflict with **Interstate Oil Pipeline v. Stone,** 337 U. S. 662, 93 L. Ed. 1613, **International Harvester Co. v. Evatt,** 329 U. S. 416, 91 L. Ed. 390, **Atlantic Lumber Co. v. Commissioner,** 298 U. S. 553, 80 L. Ed. 1328, **Central Greyhound Lines v. Mealey,** 334 U. S. 653, 92 L. Ed. 1633, and **Western Live Stock v. Bureau of Revenue,** 303 U. S. 250, 82 L. Ed. 823. Then it added:

"See also **Memphis Gas Co. v. Stone**, 335 U. S. 80, 92 L. Ed. 1832, 68 S. Ct. 1475, 340 U. S. 610, 95 L. Ed. 579."

C. **Recent Action of This Court Refutes Appellant's Contentions.**

At its last term this Court had presented to it a petition for certiorari challenging the imposition of a New Jersey tax identical in principle and circumstances of imposition to the situation in the case at bar. In **Roadway Express, Inc. v. Director**, 50 N. J. 471, 236 A. (2d) 577, appeal dismissed ... U. S. ..., 20 L. Ed. (2d) 276 for want of substantial federal question, an exclusively interstate trucking concern operating partly in New Jersey, but not qualified to do business there as a corporation, was subjected to the New Jersey franchise tax. The levy was resisted upon the basis of **Spector.**

The tax assailed was imposed *inter alia* "for the privilege of having or exercising its corporate franchise in (New Jersey)". The taxpayer had two terminals in the State, operated extensively over the highways, and maintained a substantial number of employees, but engaged in no intrastate hauling. It used the state courts to enforce and defend claims. The New Jersey Court conceded that the corporation engaged in no local activity which could be classified as intrastate, and that all activities were intimately connected with exclusively interstate commerce.

The New Jersey Supreme Court held (1) that the tax was not imposed upon the privilege of doing an interstate business, but upon other incidents within the power of the State to tax; and (2) that **Spector**, which it fully noted and discussed, should, in view of intervening decisions reflecting a changed philosophy on the part of this Court, be regarded as confined to its own precise facts. Upon this point it stated:

> "We have made these detailed references to the majority and dissenting points of view in **Spector** because we are convinced that the minority approach has since become the court's general view and that the later decisions demonstrate the case remains authority, at the very most, only in the precise statutory situation there found."

Appellee is of the opinion that the New Jersey tax was sustainable without regard to **Spector**, because imposed upon subject matter within a state's cognizance under the Constitution. He does not go so far as to suggest that **Spector** has no further value as precedent. He must observe, however, that if this Court had considered **Spector** to be as sweeping as does Appellant, most surely it would have taken jurisdiction in the **Roadway Express** case, either for the purpose of reversing the New Jersey Court or of reconciling other decisions in ostensible conflict with such a view. The observations of the New Jersey Court might indeed be regarded as an engraved invitation to this Court to grant certiorari.

This Court having declined that invitation, it is reasonably inferable at minimum that it does not regard **Spector** as proscribing state taxation of the exercise of a corporate franchise by an exclusively interstate business entity. Such an inference requires dismissal of the instant appeal.

It should further be noted that this Court's treatment of **Roadway Express** is wholly parallel to that given **Texas Gas Transmission Corp. v. Atkins**, supra, when review was sought of that decision in 1954 only three years after **Spector.** There the Tennessee Supreme Court had sustained the franchise and excise taxes as applied to a qualified foreign corporation found to be engaged solely in interstate commerce, holding the taxes to be upon the right to do business in corporate form rather than the

privilege of doing an interstate business. This Court denied certiorari. The only possible material difference between that case and the one at bar would be that Appellant is not qualified as a foreign corporation to transact business in Tennessee.

II.

There Is No Substantial Federal Question.

In addition to **Spector**, Appellant cites subsequent decisions of this Court as operating to proscribe the imposition of the taxes in question. All, however, simply go to the proposition that a state cannot under the commerce clause impose privilege taxes upon the doing of an exclusively interstate business, or carve out of that business local events which form the basis of such a tax. None hold that a State cannot make it a taxable privilege to exist or function as a corporation notwithstanding the interstate character of the corporate business.

It is not alleged that the taxes in question are discriminatory or unfairly apportioned; nor that they tax events beyond the territorial jurisdiction of Tennessee. While it is averred that they "severely burdened" Appellant's interstate commerce, the record shows that taxes similar in effect are paid to other states through which Appellant's line runs, where Appellant has qualified to carry on a corporate business. (See Schedule "P", Exhibits 5A and 6A to deposition of Witness Triece.) Likewise there is utterly no showing that prepayment of the taxes in question is a condition precedent to the right of Appellant to carry on its interstate business. To the contrary, collection is by ordinary means only. Nor is there revealed even minimal interference with the flow of interstate commerce.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the appeal herein is without merit and should be dismissed.

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Deputy Attorney General,
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Proof of Service.

I, Milton P. Rice, one of the attorneys for Appellee, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 2nd day of December, 1968, I served a copy of the foregoing Motion to Dismiss Appeal to the Supreme Court of the United States upon the Honorable H. Vincent E. Mitchell, of Squire, Sanders and Dempsey, 1800 Union Commerce Building, Cleveland, Ohio, one of the attorneys for Appellant herein, by mailing a copy thereof in a duly addressed envelope, U. S. postage prepaid.

.....

Milton P. Rice,
Deputy Attorney General,
State of Tennessee.